NOS. 40 and 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

OKLAHOMA TAX COMMISSION, *Petitioner*

v.

THE TEXAS COMPANY

OKLAHOMA TAX COMMISSION, *Petitioner*

v.

MAGNOLIA PETROLEUM COMPANY

On Writs of Certiorari to the Supreme Court of the State of Oklahoma

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OPINIONS BELOW

In No. 40, the District Court of Oklahoma County did not file an opinion, and the opinion of the Supreme Court of Oklahoma (No. 40, R. 36-39) is not reported. In No. 41, the Oklahoma Tax Com-

mission did not file an opinion and the opinion of the Supreme Court of Oklahoma (No. 41, R. 30-31) is not reported.

JURISDICTION

In both cases the judgments of the Supreme Court of Oklahoma were entered on September 23, 1947 (No. 40, R. 36-39; No. 41, R. 30-31), and petitions for rehearing were denied on January 27, 1948 (No. 40, R. 42; No. 41, R. 34). Appeals were filed in this Court on February 18 and 19, 1948. (No. 40, R. 46-49; No. 41, R. 36-38.)

On April 19, 1948, the appeals in these cases were dismissed for want of jurisdiction. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, the Court granted the petitions, the cases were consolidated for argument, and the Solicitor General was requested to file a brief as *amicus curiae*. (No. 40, R. 60; No. 41, R. 163). The jurisdiction of this Court rests on Section 237(b) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether, under the Constitution of the United States, a lessee of restricted allotted Indian lands is immune from Oklahoma taxes on his gross income and on his portion of the gross production derived from such lands.

2. Whether, if such constitutional immunity does not exist, the laws of the United States have

created an immunity for the lessee against the imposition of these taxes.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 41-51.

STATEMENT

In No. 40, the taxpayer, the Texas Company, brought suit in the District Court for Oklahoma County against the Oklahoma Tax Commission to recover certain taxes asserted to have been illegally collected. The taxpayer's petition (No. 40, R. 3-10) and amended petition (No. 40, R. 29-30) stated that it was the owner of oil and gas leases to certain specified properties which were restricted lands of members of the Kiowa and Apache Indian Tribes, title to which was held in trust by the United States pursuant to the General Allotment Act, as amended, and that the Indian lessors, in making the leases, were subject to the supervision and control of the United States Government. Asserting that the imposition of the Oklahoma gross production and petroleum excise taxes on the oil produced from these leases would constitute a burden and restriction on an instrumentality and agency of the Federal Government and would violate the Constitution of the United States, the petition claimed that the taxes so imposed were illegal and void. The taxpayer sought recovery of

the gross production and petroleum excise taxes which it had paid with respect to its working interest in the production from these leases during the months of September, October and November, 1942. The lower court sustained a demurrer filed by the Oklahoma Tax Commission. (No. 40, R. 31.) The Supreme Court of Oklahoma reversed, with directions to overrule the demurrer. (No. 40, R. 39.)

No. 41 involved consolidated proceedings before the Oklahoma Tax Commission with respect to additional assessments proposed against the taxpayer, Magnolia Petroleum Company, for gross production and petroleum excise taxes on its interest in the production from certain specified leases for the period June 1, 1942 to March 31, 1944, together with penalties. (No. 41, R. 47-50, 54-55, 59-60, 65-67.) The stipulations of facts before the Oklahoma Tax Commission (No. 41, R. 6-18) showed that the leases in question in which the taxpayer possessed a working interest were executed by allottees, or heirs and devisees of allottees, of members of the Citizen Pottawatomie, Apache, ~~Comanche, and~~ Otoe and Missouria Indian Tribes, that the allotted lands were held under land certificates or trust deeds, that the leases were approved by the United States Department of Interior, and that, in some instances, all or part of the lessor's interest was owned by non-Indians during the taxable periods. The Oklahoma Tax Commission ordered the proposed assessments approved

(No. 41, R. 26-28); but the Supreme Court of Oklahoma reversed the order, with directions that the assessments be vacated (No. 41, R. 31).

SUMMARY OF ARGUMENT

A. The Oklahoma gross production and petroleum excise taxes may be validly imposed on a lessee of restricted allotted Indian lands so as to reach his interest in the oil and gas produced. Earlier decisions of this Court holding that taxes of this nature may not be asserted against the lessee because of an implied constitutional immunity (*Howard* v. *Gipsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549) are basically inconsistent with subsequent rulings, and ought to be directly overruled. It is now well established that contractors or lessees of the United States are not immune from non-discriminatory taxes of this kind, the validity of the tax not being affected by the possible economic effects on the Federal Government. Moreover, the taxation of the lessees here has no direct economic consequences to the Government.

The present line of decisions denying the existence of an implied constitutional immunity for Federal lessees or contractors against local taxation has not drawn any distinction between taxes measured by net income, gross income or physical production. Accordingly, when it became settled that the State could impose a tax measured by the

net income of the lessees of restricted Indian lands, it similarly meant that the State could impose a non-discriminatory tax measured by their gross income or gross physical production.

The gross production tax in issue here, moreover, is imposed in lieu of other *ad valorem* taxes on the property and equipment of the lessee used in connection with his operations. Since the State may tax the value of such property directly by an *ad valorem* tax, there is no reason to deny it the right to tax the same property interests by another type of tax, especially since, though measured by gross production in the first instance, the amount of the exaction is ultimately measured by what the *ad valorem* taxes would have been.

B. Congress has not acted to establish a statutory immunity for lessees of restricted Indian lands, and none is to be implied from its legislative silence. While Congress has, on prior occasions, subjected the mineral production from certain lands to local taxation (thereby also causing the lessees to be taxed under the then prevailing constitutional doctrine), this cannot be construed as an assertion of immunity for other lessees. Differences in Congressional policy respecting the taxable status of Indian lands do not, by implication, create similar differences with respect to the private lessees. When the doctrine of implied constitutional immunity for private lessees was overturned by this Court, Congress was entitled to as-

sume that every lessee would be subject to all local, non-discriminatory taxes, unaffected by whether the royalties of their Indian lessors were or were not immune from taxation. There is no compelling reason why Congress should have acted to create an immunity for the lessees here, and there is no reason why any should be implied in the absence of a direct expression of Congressional policy in favor of the creation of such an immunity.

ARGUMENT

Lessees of Restricted Allotted Indian Lands Are Not Immune From the Oklahoma Gross Production and Petroleum Excise Taxes

A. No Constitutional Immunity Exists

1. *Introductory.* These cases involve the validity of the Oklahoma gross production tax (68 O. S. 1941; Sections 821-846, as amended by Article 1, Section 2, Laws, 1947, p. 495 (68 O. S. 1947 Supp., Section 827)), and of the Oklahoma petroleum excise tax (68 O. S. 1941, Sections 1218l-1218q; Sess. Laws 1943, title 68, c. 26, p. 189) as applied to operators of oil and gas leases on restricted allotted lands of Indians, the leases having been approved by the Secretary of the Interior as required by law. The lands involved are restricted against alienation and, for the most part, are held in trust by the United States, pursuant to allotments under the General Allotment Act,[1] for various members of

[1] Act of February 8, 1887, c. 119, 24 Stat. 388, as amended.

the Pottawatomie, Kiowa, Apache, Comanche, Otoe and Missouri Indian tribes.[2] In both cases the Supreme Court of Oklahoma, one Justice dissenting, held that the lessees or the leases were federal instrumentalities, and that, in the absence of permissive action by Congress or appropriate waiver of immunity, the lessees were not constitutionally subject to tax with respect to the production of oil and the oil produced.

We believe that the court below erred in holding that the lessees possess any immunity with respect to these taxes. It is our view that the State of Oklahoma has full authority to require the lessees to pay non-discriminatory taxes measured by the value or amount of oil and gas produced—oil and gas in which the lessees, and they alone, have any interest. The lessees, absent any express Congressional action to exempt them from local exactions,

[2] Allotments were made under the General Allotment Act to members of the Citizen Band of Pottawatomie Indians in conformity with the agreement of March 3, 1891, 26 Stat. 1016. Allotments were made to members of the Kiowa, Comanche and Apache tribes pursuant to the agreement approved June 6, 1900, 31 Stat. 676, the land being held in trust by the United States in the same manner as provided for in the General Allotment Act. Allotments were made to the Otoe or Missouri Indians under the General Allotment Act without any special agreement. See Mills, *Oklahoma Indian Land Laws (1924)*, Section 438. Lands allotted under the General Allotment Act were to be held in trust by the United States for a period of twenty-five years, and the trust periods here involved have been extended from time to time.

do not possess any immunity from these Oklahoma taxes merely because they are engaged in the business of producing oil and gas from restricted lands, and because they are operating under leases which have been approved by the Secretary of the Interior.

These cases do not involve any taxes levied on or measured by the royalty oil or its proceeds and, hence, do not present any question respecting the tax immunity of the Indians whose restricted lands have been leased. Accordingly, we express no views whether these taxes would be valid if imposed on or measured by the royalty oil. See *Carpenter* v. *Shaw*, 280 U. S. 363.

2. *The nature of the taxes.* The Oklahoma gross production tax which is involved here is equal to 5 per centum of the gross value of the production in the case of petroleum, crude oil or other mineral oil, and natural gas and casinghead gas. The tax is required to be paid by every person engaged in the production of these mineral products. The tax is also levied on the royalty interests, and is made a lien on such interests. It is provided, however, that where the royalty is claimed to be exempt from taxation by law, the facts on which the exemption is claimed are to be reported. 68 O. S. 1941, Section 821.

The statute levying the tax states that it is in lieu of all taxes by the State and its political subdivisions on any property rights with respect to the

minerals, producing leases, mineral rights or privileges, machinery and equipment used in and around any well producing oil and gas, the oil and gas during the tax year in which produced, and any investment in any of the leases, rights, privileges, minerals, or other property mentioned. The State Board of Equalization is given power to raise or lower the gross production tax where, if imposed, it is greater or less than would be the general *ad valorem* tax for all purposes on the property of the producer subject to taxation in the district or districts where situated. Revision of the amount of tax is subject to review by the Supreme Court of Oklahoma. 68 O. S. 1941, Section 821.

A gross production tax on oil, gas and other minerals (the levy being in addition to any *ad valorem* taxes) was instituted by Oklahoma in 1908. Sess. Laws, 1908, c. 71, Article II, Section 6, p. 642. This was the statute before this Court in *Choctaw & Gulf R.R.* v. *Harrison*, 235 U. S. 292, where, as applied to a lessee of restricted Indian coal lands, it was construed to be an occupational tax and an unconstitutional burden on a federal instrumentality. This interpretation was contrary to that adopted in *McAlester-Edwards Coal Co.* v. *Trapp*, 43 Okl. 510, in which the court considered the 1910 re-enactment of the statute (Sess. Laws, 1910, c. 44, Section 6, p. 67) (where an additional provision was inserted permitted the producer to deduct the amount of royalties paid for the benefit of an In-

dian tribe), and in which it was held that, the tax being on the value of the product, less the royalties to Indians, the levy was a property tax which could be validly imposed on a lessee of restricted Indian lands.

The gross production tax was extensively revised in 1915 (Sess. Laws, 1915, c. 107, Article 2, Subdivision A, p. 151), and again in 1916 (Sess. Laws, 1916, c. 39, p. 102),[3] one of the primary changes being to impose the tax in lieu of all other *ad valorem* taxes.[4]

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[3] The basic sections of the present statute are derived from these provisions. Further amendments were made by Sess. Laws, 1933, c. 103, p. 198, and by Sess. Laws, 1935, c. 66, Article 4, p. 271.

[4] The Oklahoma Supreme Court at first expressed the view that the 1915 amendments did not alter the essential structure of the statute and, following the *Choctaw & Gulf R. R.* decision, ruled that the tax was not a property but an occupation tax. *In re Gross Production Tax of Wolverine Oil Co.*, 53 Okl. 24. It, however, was quick to recede from this position. In *Large Oil Co.* v. *Howard*, 63 Okl. 143, reversed *per curiam*, 248 U. S. 549, it construed the tax, as amended by Sess. Laws, 1916, c. 39, p. 102, to be a tax on property, and considered that it could be validly levied on a lessee of restricted lands; the *Wolverine* case, *supra*, was distinguished because of changes made in the 1916 legislation. See also *Whitehill* v. *Howard*, 63 Okl. 176. The holding of the *Wolverine* case, so far as it denied that the tax was a property tax, was later specifically overruled in *In re Skelton Lead & Zinc Co.'s Gross Production Tax, 1919*, 81 Okl. 134, and this was reiterated in *Bergin Oil & Gas Co.* v. *Howard*, 82 Okl. 176. Following the *Skelton* case, the Oklahoma Supreme Court has consistently held for all purposes that the tax is a property tax which is in lieu of other *ad valorem* taxes.

The new tax, however, was held unconstitutional as applied to a lessee of restricted Indian lands in the *per curiam* decisions in *Large Oil Co.* v. *Howard*, 248 U. S. 549, and *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503. The fact that, unlike the statute considered in the *Choctaw & Gulf R.R.* case, the gross production tax was imposed in lieu of *ad valorem* taxes was not commented on by this Court in those decisions. The Oklahoma Supreme Court, nevertheless, perservered for a time. In *In re Skelton Lead & Zinc Co.'s Gross Production Tax, 1919*, 81 Okl. 134, the court refused to accept the *Large Oil Co.* and *Gipsy Oil Co.* decisions as studied evaluations of the changes in the statutory provisions.[5] After *Gillespie* v. *Oklahoma*, 257 U. S. 501, 504-505, where, in holding invalid an Oklahoma net income tax on a lessee's income from restricted lands, Justice Holmes expressed the view that the *Howard* and *Gipsy Oil* cases had not been inadvertent decisions and that the statutory differences from those presented in the *Choctaw & Gulf R.R.* case had not been of any moment, the Supreme Court of

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In re Protest of Bendelari, Agent, 82 Okl. 97; *In re Protest of U. S. Smelting, Refining & Mining Co.*, 82 Okl. 106; *In re Protest of St. Louis Smelting & Refining Co.*, 82 Okl. 128. See also: *Meriwether* v. *Lovett*, 166 Okl. 73; *American Oil & Refining Co.* v. *Cornish*, 173 Okl. 470; *State* v. *Indian Royalty Co.*, 177 Okl. 238; *Peteet* v. *Carmichael*, 191 Okl. 593.

[5] The same view was expressed in *In re Protest of Bendelari, Agent*, 82 Okl. 97, and was followed in *In re Protest of U. S. Smelting, Refining & Mining Co.*, 82 Okl. 106.

Oklahoma accepted the proposition that the gross production tax, even though in lieu of other *ad valorem* taxes, could not be levied on the lessee. See *Atchison, T. & S.F.R. Co.* v. *McCurdy*, 86 Okl. 148.

The remaining provisions of the taxes involved may be briefly reviewed. Seventy-eight percent of the gross production tax is paid into the State Treasury, and is available for the general expenses of the state government. One-tenth of the sum is payable to the County Treasurer of the county where the oil or gas is produced, and is available for the construction and maintenance of county highways. Ten percent is also payable to the County Treasurer for distribution among the various school districts in the county. The remaining two percent is placed to the credit of the Oklahoma Tax Commission, and is available for collection and enforcement activities. 68 O. S. 1941, Section 827, as amended by Article 1, Section 2, Laws, 1947, p. 495 (68 O. S. Supp. 1947, Section 827).

The gross production tax becomes due on the first day of each calendar month with respect to production during the preceding monthly period. On oil or gas sold at the time of production, the tax is to be paid by the purchaser who, in making settlement with the producer and royalty owner, is authorized to deduct the amount of the tax paid. Where the tax is due before the oil is sold, and where the oil has been retained by the producer, he is required to pay the tax including that due on the

royalty oil not sold, and he is authorized, in settling with the royalty owner, to deduct the amount of tax paid on the royalty oil, or to deduct royalty oil equivalent in value to the amount of the tax paid. 68 O. S. 1941, Section 833. The tax is made a first and paramount lien against the purchaser's or producer's property, as the case may be. 68 O. S. 1941, Section 836.

The petroleum excise tax dates from 1933 when Oklahoma adopted a proration law to prevent the waste of crude petroleum and natural gas (Sess. Laws, 1933, c. 131, p. 278) and enacted an excise tax which was to be used to defray the expenses of administering the provisions of the proration law (Sess. Laws, 1933, c. 132, p. 301). Since that time a new excise tax has been enacted at each succeeding session of the legislature.[6]

The Oklahoma petroleum excise tax is one-eighth of a cent (one mill after July 1, 1943—See 1943 statute, footnote 6) per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma. The tax is to be collected in the same manner as that provided for the gross production tax. As in the case of the gross production tax, the petroleum excise tax is paid by the purchaser.

[6] Sess. Laws, 1935, c. 59, Article 2, p. 236; Sess. Laws, 1937, c. 59, Article 2, p. 396; Sess. Laws, 1939, c. 59, Article 2, p. 412; Sess. Laws, 1941, Title 68, c. 26, p. 380; Sess. Laws, 1943, Title 68, c. 26, p. 189; Sess. Laws, 1945, Title 68, c. 26, p. 273; Sess. Laws, 1947, Title 68, c. 26, p. 461.

who is authorized to deduct the payment in settling with the producer and royalty owner and, where the oil is not sold but is retained by the producer, the tax is payable by him, but he is authorized to make a similar deduction when settling with the royalty owner. 68 O. S. 1941, Section 1218l. The monies collected are deposited to the credit of the "Conservation Fund" and the "Interstate Oil Compact Fund of Oklahoma." 68 O. S. 1941, Section 1218m. The excise taxes due in the present cases have since expired, but have been replaced by similar taxes. See 68 O. S, Supp. 1947, Sections 1220.1-1220.7. Unlike the gross production tax which, as previously referred to, is regarded by Oklahoma as a property tax, the petroleum excise tax is construed to be an excise tax on the production of oil. *Barnsdall Refineries* v. *Oklahoma Tax Commission*, 171 Okl. 145, affirmed, 296 U. S. 521.

3. *The taxes are constitutional.* The decisions below are erroneous in resting on the proposition that *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503; and, presumably, *Choctaw & Gulf R.R.* v. *Harrison*, 235 U.S. 292, require that a lessee be held immune from the Oklahoma gross production and petroleum excise taxes on his share of the oil and gas derived from restricted allotted Indian lands. Those decisions, based as they were on a doctrine of implied constitutional immunity for agencies or instrumentali-

ties of the United States, are so thoroughly inconsistent with the subsequent course of decisions of this Court that they may no longer be regarded as possessing any authority as precedents. While these cases have not been expressly overruled, they have in effect been rejected by the decisions which overturned the doctrinal basis on which they had rested.

The immunity from local taxation of allotted lands held in trust by the United States under the General Allotment Act did not arise from an express assertion of such immunity by Congress, but was held to exist because legal title to the lands was held in trust by the United States and because the subjection of the lands to local taxation would thwart the governmental policy of protecting the allottees during the period in which they were to prepare for the assumption of "the habits of civilized life, and ultimately the privileges of citizenship." *United States* v. *Rickert*, 188 U. S. 432, 437, 439. See also *United States* v. *Board of Com'rs of Fremont County, Wyo.*, 145 F. 2d 329 (C. C. A. 10th), certiorari denied, 323 U. S. 804.[7]

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[7] As previously stated (*supra*, p. 7), there is no issue in this case regarding the application of the taxes to the royalty oil, the taxpayers having paid or been assessed only with respect to production less the royalties. While the Oklahoma statute does not explicitly provide how the producer is to be taxed where the royalty oil is immune from taxation, it would seem that he has no liability for the taxes on the

The immunity of these lands from taxation was further extended to non-Indian lessees of the land and to their income derived from the land. See the remarks of Justice Black in *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 603-604. Thus, in invalidating the original Oklahoma gross production tax as applied to a lessee of restricted Indian lands in *Choctaw & Gulf R.R.* v. *Harrison, supra*, the lessee was regarded as the "instrumentality" employed by the Federal Government, and was ruled to be exempt from the tax which the Court considered as being tantamount to an occupational tax. In *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522, it was the lease itself which was regarded as the federal instrumentality and immune from a direct property tax, it being reasoned that (p. 530)—

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royalties where they are non-taxable. See ***American Oil & Refining Co.*** v. ***Cornish***, 173 Okl. 470, where the lease was from a municipality and it was assumed that the lessee had no responsibility for paying the gross production tax on the royalty oil, although he was held liable for the tax on his share of the oil produced. Accordingly, there is no present need to consider the taxable status of the royalty oil. See ***Carpenter*** v. ***Shaw***, 280 U. S. 363, holding that oil royalties received from allotted lands, lands which were expressly declared by statute to be non-taxable, were not subject to the gross production tax, it being ruled that the tax was not on the severed oil but on the lessor's interest in the property. Cf. ***Choteau*** v. ***Burnet***, 283 U. S. 691; ***Superintendent*** v. ***Commissioner***, 295 U. S. 418, and ***Leahy*** v. ***State Treasurer***, 297 U. S. 420, holding that such royalty income may be taxed under federal and state income tax statutes.

> A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.

The *Choctaw & Gulf R.R.* and *Indian Oil Co.* cases, *supra*, were the only authorities relied on in the *per curiam* dispositions of *Large Oil Co.* v. *Howard* and *Howard* v. *Gipsy Oil Co.*, *supra*, where the later enactments of the gross production tax were held invalid with respect to lessees of restricted lands. The theory of an implied constitutional immunity as extended to such lessees roughly paralleled that accorded to private contractors of the Government where the rationale was also in terms of "instrumentality" and "the power to destroy." See *Williams* v. *Talladega*, 226 U. S. 404. It reached its culmination in *Gillespie* v. *Oklahoma*, 257 U. S. 501, which denied the State of Oklahoma the power to impose a net income tax on the non-Indian lessee's income derived from restricted Indian lands. The Court there arrived at its decision by relying on the previous rulings invalidating the gross production tax and the *ad valorem* tax on the lease itself, stating (p. 506):

> The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.

The *Gillespie* case, as was true of *Indian Oil Co.* v. *Oklahoma* and *Choctaw & Gulf R.R.* v. *Harrison*, *supra*, was decided on the ground that the lessee or the lease was an instrumentality selected by the Federal Government to effectuate its policy toward the restricted lands of the Indians.[8] The same doctrine was applied and the *Gillespie* decision was followed in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393,[8] where it was held that the federal income tax could not be applied to a lessee of oil lands of the State of Oklahoma, it being said (pp. 400-401):

> To tax the income of the lessee * * * would amount to an imposition upon the lease itself.

The infirmity of the grounds on which this constitutional immunity rested had become fully apparent (See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and the cases cited *supra*, fn. 8) when *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, again raised the question of the authority of the Federal Government to impose a net income tax on a lessee of state-owned oil lands. Upon a reexamination of the matter, it was there held that

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[8] Decisions subsequent to the *Gillespie* case had already made great inroads in the doctrine of implied immunity. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *Willcuts* v. *Bunn*, 282 U. S. 216; *Alward* v. *Johnson*, 282 U. S. 509; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279. These decisions, and others, convinced the four Justices who dissented in the *Coronado* case that the *Gillespie* decision ought to be overruled.

no constitutional barrier stood to deny Congress the power to impose the tax;[9] after determining that *Burnet* v. *Coronado Oil & Gas Co., supra,* and *Gillespie* v. *Oklahoma* were incorrectly decided, both cases were expressly overruled.

The direct repudiation of those cases meant more than a reversal of decisions respecting the imposition of a net income tax on private lessees. It, together with the consistent course of decisions since *James* v. *Dravo Contracting Co.*, 302 U. S. 134, marks the complete destruction of the principles on which these lessees were once held immune from non-discriminatory taxation on their property or income. This conclusion seems to have been shared by both the majority and dissenting opinions in *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 603-604, 615.

If nothing more, the fact that the *Gillespie* case had strictly followed the reasoning of the *Choctaw & Gulf R.R.* and *Indian Oil Co.* opinions, and had also strongly relied on the *Gipsy Oil Co.* and *Large Oil Co.* decisions, would be most persuasive that all those authorities fell along with *Gillespie*, even though it was not necessary to the decision in *Mountain Producers* that they be expressly overruled at that time.

The very basis of the decision in the *Mountain Producers* case was to deny the proposition that

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[9] Accord: *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362.

a non-discriminatory tax on a Government contractor or lessee imposed a burden which caused an unconstitutional interference with the Government; the opinion stated (303 U. S. at 386-387):

> * * * that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote.

The decisions which invalidated the gross production and property taxes for the reason that the taxation of the lessee would burden the tax exempt Indian lands and hamper the policy of the Government toward its Indian wards were as clearly "out of harmony with correct principle" (303 U. S. 376, 387) as was *Gillespie* v. *Oklahoma, supra,* in applying the same erroneous concepts.

The lessees here can derive no comfort in their assertion of immunity on the ground that *Mountain Producers,* by overruling *Gillespie,* has only authorized the State to tax their *net income* from

operations under the leases, and that the taxes here are measured by *gross income* from production and by the *amount of production*. The difference between a tax on gross receipts and net earnings has been recognized as not being "controlling" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 158), for once the "burden" theory had been discarded such a distinction was no longer valid (see *Helvering* v. *Gerhardt*, 304 U. S. 405, 420-422, and *Graves* v. *N. Y. ex rel O'Keefe*, 306 U. S. 466, 480, 487). The decisions actually demonstrate that no difference is to be drawn between a tax measured by gross receipts, gross production, or net income; so long as the tax is non-discriminatory and the legal incidence is placed on the Government contractor or on his property, no constitutional immunity may be successfully asserted. *James* v. *Dravo Contracting Co.*, *supra*, and *Mason Co.* v. *Tax Commission*, 302 U. S. 186 (state gross receipts tax on contractor with Federal Government); *Atkinson* v. *Tax Commission*, 303 U. S. 20 (state net income tax on contractor with Federal Government); *Alabama* v. *King & Boozer*, 314 U. S. 1 (state sales tax on sales to cost-plus contractor with Federal Government); *Curry* v. *United States*, 314 U. S. 14 (state "use" tax on materials used by cost-plus contractor with Federal Government); *Wilson* v. *Cook*, 327 U. S. 474 (state severance tax imposed on contractor who severed and purchased timber from United States lands). See also Powell, *The Waning of Intergov-*

ernmental Tax Immunities, 58 Harv. L. Rev. 633, 640-641, 657-659 (1945).

The other, but closely related foundation of the *Choctaw & Gulf R.R.*, *Indian Oil Co.*; *Gipsy Oil Co.* and *Large Oil Co.* decisions, namely, that the lessee or lease is an "instrumentality" of the Government which enjoys a constitutional immunity from non-discriminatory taxation, is also discarded doctrine. Such is the plain teaching of the cases. *Metcalf & Eddy* v. *Mitchell, supra*; *James* v. *Dravo Contracting Co., supra*; *Mason Co.* v. *Tax Commission, supra*; *Atkinson* v. *Tax Commission, supra*; *Helvering* v. *Bankline Oil Co., supra*; *Helvering* v. *Mountain Producers Corp., supra*; *Buckstaff Co.* v. *McKinley*, 308 U. S. 358; *Alabama* v. *King & Boozer, supra*; *Curry* v. *United States, supra*; *Wilson* v. *Cook, supra*. See *United States* v. *Allegheny County*, 322 U. S. 174, 186.

If there were even the slightest doubt as to what the *Mountain Producers* decision meant with respect to the kind of taxes involved in these cases, their validity would be authoritatively established by *Wilson* v. *Cook, supra*. There the State of Arkansas imposed a severance tax which was measured by the amount of timber severed. It was held that the taxpayer, who, under contract with the Federal Government, was engaged in cutting and purchasing timber from national forest reserves, was not immune from the tax, the Court saying (327 U. S. at 482-483):

Our decision in *James* v. *Dravo Contracting Co., supra,* and in *Alabama* v. *King & Boozer, supra,* and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

The taxes involved in the present cases cannot be successfully distinguished from those imposed in *Wilson* v. *Cook, supra.* The taxpayers here are engaged in taking natural resources from restricted Indians lands and the taxpayer in *Wilson* v. *Cook, supra,* was so engaged with respect to lands belonging to the United States. In both situations the tax is levied in direct proportion to the amount of the natural resources which has been severed. The effect of the taxes on the United States here, where the beneficial ownership of the lands and the royalties is in the Indians, is even more remote than that considered in *Wilson* v. *Cook, supra,* so that the present cases are *a fortiori* situations for the denial of any immunity to the private lessees.

In the final analysis, the question is whether these taxpayers, who are engaged in the business of exploiting the resources from restricted lands for their own individual profit, and who enjoy the

benefits of state and local government, are to be excused from contributing through the gross production tax to the costs of such government, and from paying through the petroleum excise tax their fair share of the costs of a conservation program in which they derive a direct and immediate benefit. Since the Constitution does not require that such an extraordinary, preferred status be accorded to lessees or contractors of the United States, there is even less reason to suppose that a different result is to obtain where the Government's financial interest is not directly involved. See *Helvering* v. *Mountain Producers, supra.*

It is submitted, accordingly, that *Choctaw & Gulf R.R.* v. *Harrison, supra; Howard* v. *Gipsy Oil Co., supra,* and *Large Oil Co.* v. *Howard, supra,* are directly contrary to the more recent decisions of this Court and should be expressly overruled.

While the foregoing considerations sufficiently demonstrate the constitutional validity of these taxes, it may be appropriate to observe that there are added reasons for sustaining the gross production tax. This tax, so far as the lessees are concerned, is in lieu of any other *ad valorem* taxes on their property rights and investment in the minerals, mineral rights, producing leases, and machinery and equipment used in and around any well. Also, by appropriate proceedings, the gross production tax may be raised or lowered to make it conform to what the *ad valorem* taxes would have

been if imposed on such property in the first instance. See *supra*, pp. 9-13.

The decisions in *Howard* v. *Gipsy Oil Co., supra*, and *Large Oil Co.* v. *Howard, supra*, as previously indicated, considered that it made no difference whether the gross production tax was in lieu of other *ad valorem* taxes, or was in addition to such taxes (as had been true of the statute involved in the *Choctaw & Gulf R.R.* case). See *Gillespie* v. *Oklahoma*, 257 U. S. at 504-505. The *Gipsy Oil* and *Large Oil* cases, however, are contrary to the later decision in *Alward* v. *Johnson*, 282 U. S. 509, where a state gross receipts tax levied in lieu of *ad valorem* taxes was sustained, even though a portion of the taxpayer's gross receipts was derived from a contract with the Post Office Department to transport the United States mail.

The lessees here, as was true of the taxpayer in the *Alward* case, own property used in carrying on a business for profit. That property could be taxed through a direct property tax. *Taber* v. *Indian Territory Co.*, 300 U. S. 1 (sustaining the Oklahoma *ad valorem* tax on the property and equipment of a lessee of restricted Indian lands); *Indian Territory Oil Co.* v. *Board*, 288 U. S. 325 (upholding the Oklahoma *ad valorem* tax on the lessee's share of oil produced under a lease of restricted lands); *Curry* v. *United States, supra* (holding valid a "use" tax on materials purchased by a con-

tractor to carry out a construction contract for the United States).

Since Oklahoma could undoubtedly exact from these lessees their fair share of support for the cost of state and local government by means of a non-discriminatory tax on their property used in producing the oil and gas under the leases, it seems reasonable that the same essential obligations can be required from them even though the tax, in the first instance, is measured by their share of the gross production. While the State of Oklahoma has found it more feasible to tax the property used in this industry through the means of a gross production tax, which is subject to revision in accordance with *ad valorem* standards, the effect on the United States or on its Indian wards is not any different than would be true if a simple *ad valorem* tax were employed. *Alward* v. *Johnson, supra,* established the validity of this kind of tax even before the *Dravo* decision and the cases following it denied any constitutional immunity to private contractors and lessees. Its authority today is beyond question.

The court below, however, believed that *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522, which had held that a lease of restricted Indian lands was an "instrumentality" of the Federal Government whose value could not be reached by a state *ad valorem* tax, was a binding precedent which compelled the

conclusion that the lessees here were immune from the gross production and petroleum excise taxes.[10] Even if the actual decision in the *Indian Oil Co.* case could still be regarded as controlling with respect to the taxation of the lease itself, a proposition with which we cannot agree, it could not stand for the conclusion that the lessees are "instrumentalities" who are exempt from the taxes here involved, as must be apparent from the previous discussion. Further, the gross production taxes in these cases present no issue concerning the validity of taxing the value of the lease, for no question has been raised, through the appropriate statutory procedure, to test the amount of the gross production tax in comparison to what the *ad valorem* taxes would have been on the taxpayer's property exclusive of the lease.[11]

However, if this is deemed to be an appropriate opportunity, we believe that *Indian Oil Co.* v. *Okla-*

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[10] The *Indian Oil Co.* case was also relied on in the *per curiam* decisions in *Howard* v. *Gipsy Oil Co.* and in *Large Oil Co.* v. *Howard, supra.*

[11] Seeking to conform to the *Indian Oil Co.* decision, and while still attempting to uphold the gross production tax on the lessee of restricted lands, the Oklahoma Supreme Court in *In re Skelton Lead & Zinc Co.*, 81 Okl. 134, 149, intimated that in making the comparison between the amount of the gross production tax and the *ad valorem* tax, it would not be proper to include the value of the lease in the property subject to tax. Since there is nothing in the Oklahoma statute compelling such a result, the express overruling of the *Indian Oil Co.* case would leave the question open to Oklahoma for decision, unembarrassed by an infirm precedent of this Court.

homa, supra, ought also to be overruled. Since the State can validly tax the value of physical property used by such a lessee or by a Government contractor (*Taber* v. *Indian Territory Co., supra; Indian Territory Oil Co.* v. *Board, supra; Curry* v. *United States, supra*), and may even tax the value of an outstanding claim against the United States due on an open account (*Smith* v. *Davis*, 323 U. S. 111), no firm reason can exist why the State should not be able to impose a non-discriminatory tax with respect to the value of the lease or of the contract itself, either through a direct tax or by a gross production tax which is in lieu of other property taxes. The effect which such a non-discriminatory tax would have on the United States, where it is the immediate party in interest, or on its Indian wards, where leases to restricted lands are involved, is certainly no more direct or burdensome than that resulting from a tax on the lessee's physical property, or on his gross income, or on the value of his claim against the United States. We believe that *Indian Oil Co.* v. *Oklahoma, supra*, was wrong in holding that the value of such a lease could not be taxed the same as other property, and should no longer be regarded as an authoritative precedent.

B. No Statutory Immunity Has Been Created

Since the lessees do not possess a constitutional immunity which, itself, would exempt them from non-discriminatory taxes measured by their gross

receipts or gross production, it remains to be considered whether Congress has cloaked them with an immunity which they would not otherwise enjoy. If it believed that this would have a beneficial effect on the affairs of its Indian wards, and if it saw fit to pursue such a policy, Congress could undoubtedly exempt these lessees against the taxes which are here in issue. See *James* v. *Dravo Contracting Co., supra,* pp. 160-161; *Pittman* v. *Home Owners' Corp.,* 308 U. S. 21, 32-33; *Maricopa County* v. *Valley Bank,* 318 U. S. 357, 361; *Board of Comm'rs* v. *Seber,* 318 U. S. 705, 715-719; *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598; *Mayo* v. *United States,* 319 U. S. 441, 446; *Smith* v. *Davis, supra,* pp. 116-119. The question is whether Congress has actually done so.

The court below, noting that in certain instances Congress had acted to withdraw immunity and to subject certain designated restricted lands to the Oklahoma gross production tax, concluded that the lessees here were not subject to tax because Congress (No. 40, R. 37)—

> has acted on the theory that such immunity exists in the case of leases of this character unless waived.

We disagree with this reasoning and firmly believe that no conclusions can be drawn to the effect that Congress has acted so as to create an immunity for these private lessees. "The immunity formerly

said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." *Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U. S. at 604.

A brief summary of the legislative action in this field will show that there is no basis for holding that Congress presently considers that any immunity is to be accorded to these oil and gas well operators. Despite the tax-exempt character of the land, there have been instances where Congress has acted to permit taxation in some respect of the mineral production and to authorize the payment of the taxes due on account of the Indians' royalty interests. This was done in the case of the Osages,[12] the Kansas or Kaws,[13] the Quapaws,[14] and the Five

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[12] Section 5 of the Act of March 3, 1921, c. 120, 41 Stat. 1249, authorized Oklahoma to levy its gross production tax on all oil and gas produced in Osage County and directed the Secretary of the Interior to pay the tax on the royalty interests out of the royalties received by the Osage Tribe. See H. Rep. No. 1377, 66th Cong., 3d Sess.; H. Rep. No. 1278, 66th Cong., 3d Sess.; S. Rep. No. 704, 66th Cong., 3d Sess.

In *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521, it was held that this statute was not a consent to the imposition of the petroleum excise tax and, following the then prevailing immunity doctrine, that the lessee was exempt from the imposition of this tax.

[13] The Act of May 27, 1924, c. 200, 43 Stat. 176, consented to the imposition of Oklahoma taxes on the production of oil and gas from the restricted allotted lands of the Kansas or

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[14] Section 26 of the Act of March 3, 1921, c. 119, 41 Stat. 1225, as amended by the Act of April 17, 1937, c. 108, 50 Stat. 68, consented to the levy of the Oklahoma gross production

Civilized Tribes.[15] Congressional action in this respect was prompted primarily by considerations arising from the favorable economic position of the particular Indians and by the desirability of their making a direct contribution through the specified taxes to the support of local government. See the legislative materials cited in footnotes 12-15, *supra*. The result of this Congressional action, under the then prevailing decisions, was similarly to withdraw the existing immunity of the lessees.

Congress, significantly, has never taken any positive or direct action to assert an immunity for any

Footnote 13 (Cont.)

Kaw Indians and authorized the Secretary of the Interior to pay the taxes assessed against the royalties out of the funds of the particular Indians. See H. Rep. No. 269, 68th Cong., 1st Sess.; S. Rep. No. 133, 68th Cong., 1st Sess., and the letter from the Secretary of the Interior dated February 16, 1924, set forth in the Committee Reports.

Footnote 14 (Cont.)

tax on lead and zinc produced from the restricted lands of the Quapaws and directed the Secretary of the Interior to pay the taxes assessed against the royalty interests out of the funds of the individual Indian royalty owners. See H. Rep. No. 431, 75th Cong., 1st Sess.; S. Rep. No. 234, 75th Cong., 1st Sess.

[15] Section 3 of the Act of May 10, 1928, c. 517, 45 Stat. 495, provided that all minerals produced from restricted allotted lands of the members of the Five Civilized Tribes should be subject to taxation the same as minerals produced from other lands. See H. Rep. No. 1193, 70th Cong., 1st Sess.; S. Rep. No. 982, 70th Cong., 1st Sess., and the letter from the Secretary of the Interior dated March 7, 1928, set forth in the Committee Reports.

lessees of tax-exempt Indian lands. The legislative measures have been in the reverse direction, namely, to withdraw immunity from the Oklahoma gross production tax with respect to the restricted lands of certain Indian tribes. These enactments, moreover, all took place under a different climate of judicial decision, namely, when it appeared that the immunity would exist for the Indian lessors as well as for the private lessees unless Congress acted affirmatively to remove the exemption against taxation.

In this limited respect, it is true, Congress formerly acted on the assumption that the immunity of the lessee existed until waived by legislative action. This was so, however, only because such was the constitutional situation under the prevailing decisions. It does not follow, however, that Congress, ignoring the subsequent decisions of this Court, has tacitly made the same assumption during the past 10 years. Once it became clear that the cases extending constitutional immunity against taxation to private persons were no longer to be followed, Congress was not required to take affirmative action to remove an immunity from the lessees of Indian lands when that immunity no longer existed, nor was it necessary for it to consent to the imposition of particular taxes against such lessees once the previously existing constitutional barrier was removed. Its silence during this period must be interpreted in the setting of the contemporaneous

judicial decisions. *Mayo v. United States*, *supra*, 319 U. S. at 447-448.

We believe that Congress, by failing to make specific provision for the taxation of the lessees here, has not indicated any intention that they should be exempt from taxation on their activities. The situation is similar to the silence of Congress during the time that the *Gillespie* decision stood for the existence of the lessee's immunity against a state net income tax. The *Mountain Producers* case demonstrates that no significance should be attached to this, for the tax exemption there, quite properly, fell along with the constitutional doctrine, unchecked by notions of legislative intent that could only have been fabricated out of Congressional inaction. Surely, the failure of the legislature to mark its disagreement with constitutional decisions does not signify an adoption of those opinions as the policy of the law makers which will persist beyond the time that they are overruled.

Nor is the existence of a statutory exemption from taxation to be inferred from the fact that Congress has seen fit to consent to taxation of the mineral production from the lands of certain Indians but has not done so in the case of others. Differences in legislative policy respecting the taxation of the various Indian tribes do not add up to similar differences in policy towards their private lessees. The retention of whatever immunity at-

taches to the royalty interests of the lands involved in this case is not at all inconsistent with the lessees' being taxed on their income or on their share of production. The situation is parallel to that where the express retention of the tax immunity of the United States does not spell out an exemption for private persons who may have a direct association with the Government.

If the *non-sequitur* of the reasoning of the lower court were not otherwise apparent, it would become so by a consideration of the incongruous intentions imputed by it to Congress. Thus, it has never been intimated that the action of Congress outlined above or its silence in other respects gave any lessees a statutory immunity against *ad valorem* taxes on their property and equipment, or on their share of the oil. *Taber* v. *Indian Territory Co., supra; Indian Territory Oil Co.* v. *Board, supra.* Actually, Congress has acted on the supposition that such legislative immunity does not exist.[16] Also,

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[16] The Act of February 14, 1931, c. 179, 46 Stat. 1108, amended the Act of May 10, 1928, *supra*, to provide against any double taxation and to provide that where the machinery and equipment was taxed on an *ad valorem* basis for the fiscal year ended June 30, 1931, the gross production tax should not be imposed prior to July 1, 1931. The legislative history recognized that even when the land itself was tax-exempt because of the restrictions, the lessees were liable for an *ad valorem* tax on their property. H. Rep. No. 2327, 71st Cong., 3d Sess., and S. Rep. No. 1399, 71st Cong., 3d Sess., containing a letter from the Commissioner on Indian Affairs dated January 15, 1931.

the history of Congressional action and inaction was not considered to be an assertion of immunity for lessees against a State or federal net income tax. *Helvering* v. *Mountain Producers Corp.*, *supra.* It would be surprising, accordingly, if Congress should have had no objection to the imposition of an *ad valorem* tax but should have objected to the collection of the identical amounts from the lessee when accomplished by a gross production tax which is used in the place of the more cumbersome *ad valorem* levy. It would also be strange if Congress believed it proper that the lessee should pay a net income tax but not a tax measured by gross income or gross production.

Actually, when *Mountain Producers* had settled the conclusion that such lessees stand in no more favored position to invoke a constitutional immunity against a net income tax than any other private Government contractor, Congress was certainly entitled to believe that these lessees would be required to pay the same kind of non-discriminatory local taxes as other contractors are required to bear. The failure of Congress, either before or after the *Mountain Producers* decision, to assert a tax exempt status for the lessees of restricted Indian lands, undoubtedly indicates an intent to permit them to be taxed by the local authorities to the limit of constitutional power.

Once the constitutional doctrine was resolved against the existence of the immunity, there was no

plausible reason for creating an implied legislative one. Except as it may be reflected in an increased income to the Indians, Congress would have no discernible purpose in exempting the lessees from the taxes which are under consideration. However, whether such an exemption would result in an increased return to the Indian wards is only theoretic. The observations in the *Mountain Producers* case, *supra*, pp. 386-387, that a tax on the lessee's net income has only a remote or indirect effect on the Government is supported by the fact that the leases approved by the Department of Interior provided for the same rental and royalty payments both before and after the overruling of *Gillespie* v. *Oklahoma, supra.*[17] Further, the royalty and rental payments provided for by the Department of Interior in the case of leases of lands allotted under

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[17] Under Regulations Governing the Leasing of Restricted Allotted Indian Lands for Mining Purposes, approved October 8, 1937 (25 C. F. R., Sections 189.1-189.33) (issued prior to the *Mountain Producers* decision but still in effect), leases are offered to the bidder offering the highest bonus, in addition to the stipulated rentals and royalties which are a rental of \$1.25 per acre per year and royalties of $12\frac{1}{2}$ percent, the rental to be credited on the royalties due. The same royalties (without a minimum rental) were provided for in the predecessor regulations approved July 7, 1925.

Because differences in the value of different tracts of land would be reflected in the bonus which the lessor is willing to pay, an exact comparison is impossible. The fact that the royalties have remained the same does, however, tend to show that the lessors have not been significantly affected by the *Mountain Producers* decision.

the General Allotment Act are exactly the same as those in the case of lands of members of the Five Civilized Tribes, where the lessees have been subject to the gross production tax since 1928.[18] It seems a safe conclusion that the lessee's tax status has little, if any, effect on the Indian royalty owners. At least, if the taxation of the lessee is deemed to have an adverse effect on the governmental policy toward the Indian lessors, it is a matter which should call for a positive indication by Congress.[19]

The rejection of the "economic burden" argument as a ground for implying a constitutional tax immunity is equally persuasive for rejecting the contention that Congress has created one by inference. *Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U. S. at 604. The statement in *Graves* v. *N. Y. ex rel. O'Keefe*, *supra*, 306 U. S. at 480, is similarly apt here—

> if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any

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[18] See Regulations Governing the Leasing of Restricted Lands of Members of Five Civilized Tribes, Oklahoma, for Mining, approved April 27, 1938 (25 C. F. R., Sections 183.1-183.49).

[19] Since the lessees, as previously indicated, are liable for *ad valorem* taxes, it is difficult to see why the gross production tax, when levied in lieu of such taxes, would have such an effect on the royalty owners as to impel Congress to invoke an immunity for the lessees against this tax, but not against the *ad valorem* tax.

purpose on the part of Congress to create an immunity.

In the absence of a clear expression of a legislative purpose to immunize a private lessee or contractor from non-discriminatory local taxation, doubtful indications of Congressional intent ought to be interpreted against the existence of such immunity. *Smith* v. *Davis, supra*, 323 U. S. at 117; *Oklahoma Tax Comm'n* v. *United States, supra*; *Buckstaff Co.* v. *McKinley*, 308 U. S. 358; *Graves* v. *N. Y. ex rel. O'Keefe, supra*, 306 U. S. at 479-480. Here, where Congress has never expressed a purpose to place the private lessee in a tax immune status, the conclusion is clear. A cautious approach in interpreting the silence of Congress will not only avoid the casting of an unnecessary burden on it to disavow an immunity which it does not desire, but will also prevent an unwarranted temporary interference with the taxing authority of the State.[20]

[20] Where the immunity of the United States itself or of its property is asserted, the silence of Congress must be given an opposite meaning for it is not incumbent on Congress to make an express declaration of the immunity. See *United States* v. *Allegheny County*, 322 U. S. 174, 177, 189; *Mayo* v. *United States*, 319 U. S. 441, 447-448. Whether Congressional silence, where the taxable status of the property of Indians is in question, should be weighed for or against the existence of the immunity (compare *Oklahoma Tax Comm'n* v. *United States, supra*, and *Superintendent* v. *Commissioner, supra*, with *Carpenter* v. *Shaw, supra*, and *United States* v. *Rickert, supra*) need not be resolved here, for the tax immunity of a

These matters plainly indicate the conclusion that no tax immunity exists for the taxpayers in these cases.

CONCLUSION

In view of the foregoing, the decisions below should be reversed and the validity of the imposition of the taxes should be sustained.

Respectfully submitted,

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private lessee or contractor stands on an altogether different basis and no sound reason can be suggested for a "liberal" interpretation in favor of its existence.

APPENDIX

68 Oklahoma Statutes (1941):

§ 821. *Gross production tax on minerals, oil and gas—Powers of Tax Commission—Tax in lieu of other taxes—Equalization.*—Every person, firm, association or corporation engaged in the mining or production, within this State, of the aforesaid asphalt, or of ores bearing lead, zinc, jack, gold, silver, or copper, or of petroleum or other crude oil or other mineral oil, natural gas and/or casinghead gas, shall, monthly, file with the Oklahoma Tax Commission, a statement under oath, on forms prescribed by it, showing the location of each mine or oil or gas well operated or controlled by such person, firm, corporation or association during the last preceding monthly period; the kind of such mineral, oil or gas produced; the gross amount thereof produced; and the actual cash value thereof at the time and place of production, including any and all premiums received from the sale thereof; the amount of royalty payable thereon; and, where such royalty is claimed to be exempt from taxation by law, the facts on which such claim of exemption is based, and such other information pertaining thereto as the Oklahoma Tax Commission may require, and shall, at the same time pay to the Oklahoma Tax Commission, a tax equal to three-fourths of one per centum on the gross value of asphalt, ores bearing lead, zinc, jack, gold, silver and copper

produced which is hereby levied and a tax equal to five per centum of the gross value of the production of petroleum or other crude or mineral oil which is hereby levied based on 42 U. S. gallons of 231 cubic inches per gallon, computed at a temperature of 60 degrees Fahrenheit for oil measurements and a tax equal to five per centum of the gross value of the production of natural gas and/or casinghead gas, which is hereby levied. Provided, however, that none of the provisions of this Act shall be construed to affect or impair the liability imposed upon the purchaser of petroleum crude oil or other mineral oil, natural gas and/or casinghead gas, by any law or laws of the State of Oklahoma relating to the payment of gross production taxes by the purchasers of such petroleum crude oil or other mineral oil, natural gas and/or casinghead gas.

The tax hereby levied shall also attach to, and is levied on, what is known as the royalty interest; and the amount of such tax shall be a lien on such interest.

The Oklahoma Tax Commission shall have power to require any such person, firm, corporation or association engaged in mining or the production and/or purchaser of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil, natural gas and/or casinghead gas, or the owner of any royalty interest therein to furnish any additional information by it deemed to be necessary for the purpose of correctly computing the

amount of said tax; and to examine the books, records and files of such person, firm, corporation or association; and shall have power to conduct hearings and compel the attendance of witnesses, and the production of books, records and papers of any person, firm, association or corporation.

* * * * *

The payment of the taxes herein imposed shall be in full, and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas and/or casinghead gas, or any mine producing asphalt or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or other property hereinbefore in this paragraph mentioned or described; and any inter-

est in the land, other than that herein enumerated, and oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year, shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

No equipment, material or property shall be exempt from the payment of ad valorem tax by reason of the payment of the gross production tax as herein provided except such equipment, machinery, tools, material or property as is actually necessary and being used and in use in the production of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil, or other mineral oil or of natural gas and casing-head gas; and it is expressly declared that no ice plants, hospitals, office buildings, garages, residences, gasoline extractions or absorption plants, water systems, fuel systems, rooming houses and other buildings, nor any equipment or material used in connection therewith shall be exempt from ad valorem tax.

The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would

be on the property of such producer subject to taxation in the district or districts where the same is situated and also the value of oil, gas, or mineral leases, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered.

§ 827 [as amended by Article I, Section 2, Laws, 1947, p. 495 (68 O. S. Supp. 1947, Sec. 827)]:

Apportionment and use of proceeds of tax.—The gross production tax provided for in this Act is hereby levied and shall be collected and apportioned as follows, to-wit:

Seventy-eight per centum (78%) of all monies collected hereunder shall be paid to the State Treasury of the State of Oklahoma to be placed in the General Revenue Fund of the State and used for

the general expenses of State government, to be paid out only upon direct appropriations of the Legislature of the State of Oklahoma.

One-tenth (1/10) of the sum collected from each county whence the oil or natural gas and/or casing-head gas or asphalt or of ores bearing lead, zinc, jack, gold, silver, or copper was produced shall be paid to the County Treasurer of such county, to be credited by said County Treasurer of such county to a fund of such county known as the County Highway Construction and Maintenance Fund, and shall be used for the construction and maintenance of county highways.

One-tenth (1/10) of the sum collected from each county whence the oil or natural gas and/or casing-head gas or asphalt or of ores bearing lead, zinc, jack, gold, silver, or copper, or other mineral or substance covered hereby was produced, shall be paid to the County Treasurer of such county, and by him apportioned, on average daily attendance per capita distribution basis, as certified to him by the County Superintendent, to the school districts of the county where such pupils attend school regardless of residence of such pupil; provided the majority school district makes an ad valorem tax levy of fifteen (15) mills for the current school year, and the separate schools of the county make an ad valorem tax levy of one and five-tenths (1.5) mills and had a legal average daily attendance of thirteen (13) or more pupils during the next pre-

ceding year. It is hereby provided that the various school districts of the counties of the State may use as a basis for arriving at the amount to be estimated the actual income received from the same source the previous fiscal year.

Two per centum (2%) of all monies collected under this Act shall be placed to the credit of the fund designated as the "Oklahoma Tax Commission Fund", to be used for the collection of revenues levied hereunder, and under prior Acts, and for the enforcement hereof. The Commission shall appoint necessary employees and incur all necessary expenses for such purposes. Upon the presentation of a claim upon itemized vouchers approved by the Oklahoma Tax Commission and upon forms required by law the State Auditor shall draw warrants therefor upon the State Treasury, and the same shall be paid out of the aforesaid Fund; and the said Fund or so much as may be necessary is hereby appropriated for the payment of salaries and expenses as above mentioned; and if at the end of any fiscal year any part of said Fund shall remain unexpended such balance shall by the State Treasurer be transferred to and become a part of the General Revenue Fund of the State.

§ 833. *Payment of tax on monthly basis—When tax due—When delinquent—Payment by purchaser—By producer—How casinghead gas taxed.* —The gross production tax on asphalt or of ores

bearing lead, zinc, jack, gold, silver or copper, or of petroleum oil, natural gas or casinghead gas, as provided by law, shall, after June 30, 1933, be paid on a monthly basis in accordance with this Act.

Said tax shall become due on the first day of each calendar month on all lead, zinc, jack, gold, silver or copper, petroleum oil, natural gas or casinghead gas produced in and saved during the preceding monthly period, and if the tax is not paid on or before the end of said month the same becomes due the tax shall become delinquent and shall be collected in the manner provided by law for the collection of delinquent gross production taxes.

On oil, gas or casinghead gas sold at the time of production the gross production tax thereon shall be paid by the purchaser of such products, and such purchaser shall, and is hereby authorized to deduct in making settlements with the producer and/or royalty owner, the amount of tax so paid; provided, that in the event oil on which such gross production tax becomes due is not sold at the time of production but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner such producer shall have the right to deduct the amount of such tax so paid on royalty oil or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of the tax paid. The gross pro-

duction tax upon asphalt, or on ores bearing lead, zinc, jack, gold, silver or copper shall on and after June 30, 1933, be paid by the producer for himself, including the royalty interest, provided further that in settlement with the royalty owner such producer shall have the right to deduct the amount of such tax so paid on royalty asphalt, or on ores bearing lead, zinc, jack, gold, silver or copper, or to deduct therefrom royalty asphalt, or ores bearing lead, zinc, jack, gold, silver or copper equivalent in value at the time such tax became due, to the amount of the tax paid.

Casinghead gas when produced and utilized in any manner, except when used in the operation of the lease or premises in the production of oil or gas therefrom, or for repressing thereon, shall be considered for the purpose of this Act, as to the amount utilized, as casinghead gas actually produced and saved.

In case oil, gas or casinghead gas is sold under circumstances where the sale price does not represent the cash price thereof prevailing for oil, gas or casinghead gas of like kind, character or quality in the field from which such product is produced, the Oklahoma Tax Commission may require the said tax to be paid upon the basis of the prevailing price then being paid at the time of production thereof in said field for oil, gas or casinghead gas of like kind, quality and character.

§ 836. *Lien for tax—Liability not released by provision for payment.*—The tax herein referred

to shall, at all times, be and constitute a first and paramount lien against the purchaser's or producer's property as the case may be, both real and personal; and the provisions hereof, making the purchaser liable to pay such tax, and the provisions requiring the producer to pay the royalty owner's tax, in nowise releases the producer or purchaser from liability to pay same, in all cases where such tax is not paid.

§12181. *Levy of tax until June 30, 1943—Amount—Report, collection and payment.*—Until June 30, 1943, there is hereby levied an excise tax of one-eighth (1/8) of one cent (1¢) per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage, approval and effective date of this Act. Such excise tax of one-eighth (1/8) of one cent (1¢) per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by law, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that, in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on roy-

alty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid.

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